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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

In re Trader Joe's Tuna Litigation

Case No. 2:16-cv-01371-ODW-AJW

**MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: October 22, 2018
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor
Judge: Hon. Otis D. Wright II

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I. INTRODUCTION

Plaintiff Atzimba Reyes (“Plaintiff Reyes” or the “Class Representative”), by and through her counsel, respectfully submits this memorandum of law in support of her Motion for Preliminary Approval of Class Action Settlement.

The Stipulation for Class Action Settlement (“Settlement Agreement”)¹ states that Defendants Trader Joe’s Company and Trader Joe’s East Inc. (collectively, “Trader Joe’s” or “Defendants,” and together with Plaintiff Reyes, the “Parties”), on behalf of the suppliers of the Trader Joe’s Tuna Products,² will pay \$1.3 million into a Settlement Fund in cash for the settlement of all claims in this action. *See* Settlement Agreement ¶ 2.1, Fisher Decl. Ex. 1. The Settlement Agreement defines the Settlement Class to include:

All persons in the United States who purchased Trader Joe’s Tuna from January 5, 2012 through the date on which class notice is disseminated.

The Settlement Agreement includes a \$29.00 per claim payout for Settlement Class Members, subject to pro rata dilution if the total amount of claims exceeds the available funds. Settlement Agreement ¶ 2.3(a), Fisher Decl. Ex. 1. This is an excellent result for Settlement Class Members compared to their likely recovery should they prevail at trial. That is, a recovery of \$29 cash is a substantial portion of the maximum recovery any Settlement Class Member could reasonably expect, considering the relatively low cost of a can of tuna, only a fraction of which is alleged to be underfilled. Fisher Decl. ¶¶ 13-14.

¹ All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement, filed concurrently herewith. *See* Fisher Decl. Ex. 1.

² As used in both the Settlement Agreement and in Plaintiff’s operative Class Action Complaint, the terms “Trader Joe’s Tuna” and “Trader Joe’s Tuna Products” mean: (i) 5-ounce canned Trader Joe’s Albacore Tuna in Water Salt Added, (ii) 5-ounce canned Trader Joe’s Albacore Tuna in Water Half Salt, (iii) 5-ounce canned Trader Joe’s Albacore Tuna in Water No Salt Added, (iv) 5-ounce canned Trader Joe’s Albacore Tuna in Olive Oil Salt Added, (v) 5-ounce canned Trader Joe’s Skipjack Tuna in Water With Sea Salt, and (vi) 5-ounce canned Trader Joe’s Yellowfin Tuna in Olive Oil Solid Light.

1 As in any class action, the proposed Settlement is initially subject to
2 preliminary approval and then to final approval by the Court after notice to the class
3 and a hearing. Plaintiff now requests that this Court enter an order in the form of the
4 accompanying [Proposed] Order Granting Motion For Preliminarily Approval Of
5 Class Action Settlement, which will:

- 6 (1) Grant preliminary approval of the proposed
7 Settlement;
- 8 (2) Provisionally certify the Settlement Class on a
9 nationwide basis for the purposes of preliminary
10 approval, designate Plaintiff Reyes as the Class
11 Representative, and Bursor & Fisher, P.A. as Class
Counsel for the Settlement Class;
- 12 (3) Establish procedures for giving notice to members of
13 the Settlement Class;
- 14 (4) Approve forms of notice to Settlement Class
15 Members;
- 16 (5) Mandate procedures and deadlines for exclusion
17 requests and objections; and
- 18 (6) Set a date, time and place for a final approval hearing.

19 The proposed Settlement is fair and reasonable and falls within the range of
20 possible approval. It is the product of extended arm's-length negotiations between
21 experienced attorneys familiar with the legal and factual issues of this case. Class
22 Counsel has conducted an extensive investigation into the facts and law relating to this
23 matter and has engaged in lengthy and detailed informal discovery to confirm critical
24 facts regarding the scope of the class, the volume of product sales, the role of
25 suppliers, relevant labeling and advertising, and the relative values of Trader Joe's
26 Tuna Products sold during the Settlement Class Period. The investigation has
27 included commissioning pressed weight testing of Trader Joe's Tuna and reviewing
28

1 numerous pressed weight test reports in cooperation with qualified experts from the
2 U.S. National Oceanic and Atmospheric Administration (“NOAA”).

3 Additionally, Bursor & Fisher is singularly experienced with the issues
4 particular to this action. In *Hendricks v. StarKist Co.*, No. 13-cv-00729-HSG (N.D.
5 Cal.) (the “*StarKist Action*”), Bursor & Fisher successfully resolved virtually identical
6 claims involving the alleged underfilling of StarKist-brand 5-ounce cans of tuna. *See*
7 July 23, 2015 Order Granting Preliminary Approval, Ex. 2 to Fisher Decl.; *see also*
8 Bursor & Fisher Firm Resume, Ex. 4 to Fisher Decl. In fact, Bursor & Fisher is the
9 only law firm that has ever successfully litigated claims involving the underfilling of
10 canned tuna to resolution. Fisher Decl. at ¶ 3. In the *StarKist Action*, the parties
11 agreed to a settlement valued at \$12 million and received over 2.4 million claims, the
12 largest number of submitted claims at the time from class members in the history of
13 class actions. *Id.*

14 Since entering into the settlement in the *StarKist Action*, Bursor & Fisher
15 brought this action and two other additional cases concerning the alleged underfilling
16 of canned tuna: *Soto v. Wild Planet Foods, Inc.*, 15-cv-05082-BLF (N.D. Cal.) (the
17 “*Wild Planet Action*”); and *Soto v. Safeway, Inc.*, 15-cv-05078-EMC (N.D. Cal.) (the
18 “*Safeway Action*”). *Id.* at ¶ 4. The *Wild Planet Action* concerned allegations that
19 Wild Planet and Sustainable Seas-brand canned tuna were underfilled. *Id.* On
20 November 21, 2016, prior to a ruling on the defendant’s motion to dismiss, the parties
21 settled the *Wild Planet Action* on a nationwide basis, comprising of a common fund in
22 the amount of \$1.7 million. *Id.*, Ex. 3. Similarly, the *Safeway Action* concerned
23 allegations that Safeway-brand canned tuna was underfilled. On March 1, 2017, prior
24 to a ruling on the defendant’s motion to dismiss, the parties resolved the *Safeway*
25 matter to their mutual satisfaction. *See id.* at ¶ 4.

26 As a result of these efforts and the experience gained in litigating the *StarKist*
27 Action, the *Wild Planet Action*, and the *Safeway Action*, Class Counsel is fully
28

1 informed of the merits of the instant action and the proposed settlement, has
2 substantial experience in consumer litigation regarding underfilling of tuna cans and
3 has, as a result, been efficient in substantially streamlining the fact gathering process
4 so as to reach the proposed settlement promptly and without protracted litigation. *Id.*
5 at ¶¶ 3-5.

6 The proposed Settlement Class meets every element of Rule 23(a) and (b)(3).
7 The Settlement Class is so numerous that the joinder of all members is impracticable;
8 there are questions of law or fact common to the proposed Settlement Class; the
9 proposed Class Representative's claims are typical of those of the Settlement Class;
10 and the proposed Class Representative will fairly and adequately protect the interests
11 of the proposed Settlement Class. In addition, common issues of law and fact
12 predominate over any questions affecting only individual class members, and a class
13 action as proposed here is superior to other available methods for the fair and efficient
14 adjudication of the controversy.

15 **II. PROCEDURAL BACKGROUND**

16 **A. Pleadings And Motions**

17 On January 5, 2016, Plaintiff Sarah Magier commenced an action entitled
18 *Magier v. Trader Joe's Co.*, No. 1:16-cv-00043 (S.D.N.Y.), as a proposed class
19 action, asserting claims for breach of express warranty, breach of the implied
20 warranty of merchantability, breach of the implied warranty of fitness for a particular
21 purpose, unjust enrichment, violation of New York's General Business Law § 349,
22 violation of New York's General Business Law § 350, negligent misrepresentation,
23 and fraud. At issue in the *Magier* matter were allegations that Trader Joe's
24 underfilled certain 5-ounce canned tuna products.

25 On January 29, 2016, Plaintiff Sarah Magier amended her operative complaint
26 to add the allegations of Plaintiff Atzimba Reyes. In doing so, the amended *Magier*
27 complaint added claims for violation of California's Consumers Legal Remedies
28

1 Act, violation of California's Unfair Competition Law, and violation of California's
2 False Advertising Law.

3 On February 26, 2016, Plaintiff Amy Joseph commenced an action entitled
4 *Joseph v. Trader Joe's Co.*, 2:16-cv-01371-ODW-AJW (C.D. Cal.), as a proposed
5 class action. At issue in the *Joseph* matter were allegations that Trader Joe's
6 Company underfilled certain 5-ounce canned tuna products.

7 On February 26, 2016, Plaintiff Kathy Aliano commenced an action entitled
8 *Aliano v. Trader Joe's Co.*, No. 1:16-cv-02623 (N.D. Ill.), as a proposed class action.
9 At issue in the *Aliano* matter were allegations that Trader Joe's Company underfilled
10 certain 5-ounce canned tuna products.

11 On March 11, 2016, Plaintiff Aliano filed a Motion for Coordination or
12 Consolidation and Transfer Pursuant to 28 U.S.C. § 1407 (the "Motion for
13 Coordination") with the United States Judicial Panel on Multidistrict Litigation (the
14 "JPML"), seeking coordination of the *Aliano*, *Joseph*, and *Magier* matters.

15 On April 19, 2016, Plaintiff Christine Shaw commenced an action entitled
16 *Shaw v. Trader Joe's Co.*, No. 2:16-cv-02686-ODW-AJW (C.D. Cal.), as a proposed
17 class action. At issue in the *Shaw* matter were allegations that Trader Joe's
18 Company underfilled certain 5-ounce canned tuna products.

19 On May 26, 2016, counsel for the Parties appeared before the JPML and
20 agreed to stipulate to a change of venue pursuant to 28 U.S.C. § 1404, such that the
21 *Aliano*, *Joseph*, *Magier*, and *Shaw* matters "will be venued in the Central District of
22 California." Based on these representations, the JPML considered the Motion for
23 Coordination to be withdrawn, in favor of voluntary transfer and coordination
24 pursuant to 28 U.S.C. § 1404.

25 On November 1, 2016, following the Parties' voluntary transfer to the U.S.
26 District Court for the Central District of California before Judge Otis D. Wright II,
27 the Court ordered the *Aliano*, *Joseph*, *Magier*, and *Shaw* matters to be consolidated
28

1 and thereafter captioned *In re Trader Joe's Tuna Litigation*, No. 2:16-cv-01371-
2 ODW-AJW (C.D. Cal.) (the "Action").

3 On November 7, 2016, counsel for Plaintiffs Aliano, Joseph, and Shaw filed a
4 Motion for Appointment of Interim Class Counsel, pursuant to Fed. R. Civ. P. 23(g).
5 On November 7, 2016, counsel for Plaintiffs Magier and Reyes filed a competing
6 Motion for Appointment of Interim Class Counsel. On December 21, 2016, the
7 Court appointed Plaintiffs Magier and Reyes' counsel, Bursor & Fisher, P.A., as sole
8 Interim Class Counsel.

9 On January 20, 2017, Plaintiffs Magier and Reyes filed the First Amended
10 Class Action Complaint in the consolidated *In re Trader Joe's Tuna Litigation*
11 matter, asserting claims for breach of express warranty, breach of the implied
12 warranty of merchantability, unjust enrichment, violation of New York's General
13 Business Law § 349, violation of New York's General Business Law § 350,
14 negligent misrepresentation, fraud, violation of California's Consumers Legal
15 Remedies Act, violation of California's Unfair Competition Law, and violation of
16 California's False Advertising Law.

17 On March 21, 2017, Trader Joe's moved to dismiss the First Amended Class
18 Action Complaint in the Action. On June 2, 2017, the Court granted Trader Joe's
19 motion to dismiss, with leave to amend, based predominantly on preemption
20 grounds.

21 On June 30, 2017, Plaintiffs Magier and Reyes filed the Second Amended
22 Class Action Complaint in the Action. On July 28, 2017, Trader Joe's moved to
23 dismiss the Second Amended Class Action Complaint in the Action. On October 3,
24 2017, the Court granted in part and denied in part Trader Joe's motion to dismiss the
25 Second Amended Class Action Complaint. Specifically, the Court dismissed
26 Plaintiff Magier's claims in their entirety as preempted. As to Plaintiff Reyes, the
27 Court dismissed her claims for breach of express warranty and negligent
28

1 misrepresentation. Accordingly, the remaining claims consist of Plaintiff Reyes'
2 claims for breach of the implied warranty of merchantability, unjust enrichment,
3 fraud, violation of California's Consumers Legal Remedies Act, violation of
4 California's Unfair Competition Law, and violation of California's False Advertising
5 Law. On November 9, 2017, Trader Joe's filed its Answer to the Second Amended
6 Class Action Complaint. On March 30, 2018, Trader Joe's filed an Amended
7 Answer to the Second Amended Class Action Complaint.

8 **B. Discovery**

9 Plaintiff engaged in formal and informal factual discovery over a period of
10 several months with Trader Joe's, exchanging detailed data and analytics regarding
11 Trader Joe's pressed weight testing, as well as nationwide wholesale and retail sales
12 data regarding the Trader Joe's Tuna Products. Fisher Decl. at ¶ 7. Plaintiff also
13 commissioned the services of NOAA for a series of pressed weight tests over a period
14 of several months, which included consultations with experts from NOAA regarding
15 the test data and its reliability. *Id.* Because Plaintiff had the benefit of Class
16 Counsel's experience in the *StarKist* Action, the *Wild Planet* Action, and the *Safeway*
17 Action, Plaintiff was able to substantially streamline the fact-gathering process,
18 which, in light of Trader Joe's cooperation and production of necessary
19 documentation and the test data obtained from NOAA, resulted in an efficient
20 resolution without protracted litigation. *Id.*

21 Specifically, on November 22, 2017, the Parties exchanged discovery
22 requests. *Id.* at ¶ 8. Specifically, Plaintiff Reyes served interrogatories and requests
23 for production on Trader Joe's. *Id.* That same day, Trader Joe's served requests for
24 production on Plaintiff Reyes. *Id.*

25 On December 22, 2017, the Parties served their written discovery responses.
26 *Id.* at ¶ 9. Plaintiff Reyes made her first document production on January 2, 2018.
27 *Id.* Trader Joe's made their first document production on January 19, 2018. *Id.*

1 Trader Joe's made subsequent document productions on May 11, 2018 and May 21,
2 2018. *Id.*

3 On March 1, 2018, Plaintiff Reyes served a subpoena on a third-party,
4 Tri-Union Seafoods, LLC ("Tri-Union"). *Id.* at ¶ 10. On April 13, 2018, Tri-Union
5 made its first document production. *Id.* Tri-Union made a subsequent document
6 production on April 20, 2018. *Id.*

7 On May 14, 2018, Plaintiff Reyes served a notice of deposition pursuant to
8 Rule 30(b)(6) on Trader Joe's. *Id.* at ¶ 11. On May 16, 2018, Plaintiff Reyes served
9 an additional five deposition notices for various employees of Trader Joe's. *Id.*

10 On July 9, 2018, following months of informal negotiations, the Parties
11 attended an in-person mediation, where they executed a binding Class Action
12 Settlement Term Sheet, subject to approval of the Court. *Id.* at ¶ 12.

13 **III. THE LEGAL STANDARD FOR PRELIMINARY APPROVAL**

14 Approval of class action settlements involves a two-step process. First, the
15 Court must make a preliminary determination whether the proposed settlement
16 appears to be fair and is "within the range of possible approval." *In re Syncor ERISA*
17 *Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F.
18 Supp. 2d 1078, 1079 (N.D. Cal. 2007); *Alaniz v. California Processors, Inc.*, 73
19 F.R.D. 269, 273 (N.D. Cal. 1976), *cert. denied sub nom. Beaver v. Alaniz*, 439 U.S.
20 837 (1978). If so, notice can be sent to Settlement Class Members and the Court can
21 schedule a final approval hearing where a more in-depth review of the settlement
22 terms will take place. *See Manual for Complex Litigation, 3d Edition*, § 30.41 at 236-
23 38 (hereafter, the "Manual").

24 The purpose of preliminary approval is for the Court to determine whether the
25 parties should notify the putative class members of the proposed settlement and
26 proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
27 at 1079. Notice of a settlement should be disseminated where "the proposed
28

1 settlement appears to be the product of serious, informed, non-collusive negotiations,
2 has no obvious deficiencies, does not improperly grant preferential treatment to class
3 representatives or segments of the class, and falls within the range of possible
4 approval.” *Id.* (quoting NEWBERG ON CLASS ACTIONS § 11.25 (1992)). Preliminary
5 approval does not require an answer to the ultimate question of whether the proposed
6 settlement is fair and adequate, for that determination occurs only after notice of the
7 settlement has been given to the members of the settlement class. *See Dunk v. Ford*
8 *Motor Company*, 48 Cal. App. 4th 1794, 1801 (1996).

9 Nevertheless, a review of the standards applied in determining whether a
10 settlement should be given *final* approval is helpful to the determination of
11 preliminary approval. One such standard is the strong judicial policy of encouraging
12 compromises, particularly in class actions. *See In re Syncor*, 516 F.3d at 1101 (citing
13 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*,
14 459 U.S. 1217 (1983)).

15 While the district court has discretion regarding the approval of a proposed
16 settlement, it should give “proper deference to the private consensual decision of the
17 parties.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In fact,
18 when a settlement is negotiated at arm’s-length by experienced counsel, there is a
19 presumption that it is fair and reasonable. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d
20 373, 378 (9th Cir. 1995). Ultimately, however, the Court’s role is to ensure that the
21 settlement is fundamentally fair, reasonable, and adequate. *See In re Syncor* 516 F.3d
22 at 1100.

23 Beyond the public policy favoring settlements, the principal consideration in
24 evaluating the fairness and adequacy of a proposed settlement is the likelihood of
25 recovery balanced against the benefits of settlement. “[B]asic to this process in every
26 instance, of course, is the need to compare the terms of the compromise with the likely
27 rewards of litigation.” *Protective Committee for Independent Stockholders of TMT*
28

1 *Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, “the court’s
2 intrusion upon what is otherwise a private consensual agreement negotiated between
3 the parties to a lawsuit must be limited to the extent necessary to reach a reasoned
4 judgment that the agreement is not the product of fraud or overreaching by, or
5 collusion between, the negotiating parties, and that the settlement, taken as a whole, is
6 fair, reasonable and adequate to all concerned.” *Officers for Justice*, 688 F.2d at 625.

7 In evaluating preliminarily the adequacy of a proposed settlement, particular
8 attention should be paid to the process of settlement negotiations. Here, the
9 negotiations were conducted by experienced class action counsel. Thus, counsel’s
10 assessment and judgment are entitled to a presumption of reasonableness, and the
11 Court is entitled to rely heavily upon their opinion. *Boyd v. Bechtel Corp.*, 485 F.
12 Supp. 610, 622-23 (N.D. Cal. 1979).

13 **IV. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND**
14 **REASONABLE**

15 Rule 23(e)(2) provides that “the court may approve [a proposed class action
16 settlement] only after a hearing and on finding that it is fair, reasonable, and
17 adequate.” When making this determination, the Ninth Circuit has instructed district
18 courts to balance several factors: (1) the strength of the plaintiff’s case; (2) the risk,
19 expense, complexity, and likely duration of further litigation; (3) the risk of
20 maintaining class action status throughout the trial; (4) the amount offered in
21 settlement; (5) the extent of discovery completed and the stage of the proceedings; and
22 (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;³ *Churchill*
23 *Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of
24 these factors readily establishes that the proposed settlement should be preliminarily
25 approved.

26
27 ³ In *Hanlon*, the Ninth Circuit also instructed district courts to consider “the reaction of the class
28 members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026. This consideration is more
germane to final approval, and will be addressed at the appropriate time.

1 **A. Strength Of The Plaintiff's Case**

2 In determining the likelihood of a plaintiff's success on the merits of a class
3 action, "the district court's determination is nothing more than an amalgam of delicate
4 balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at
5 625 (internal quotations omitted). The court may "presume that through negotiation,
6 the Parties, counsel, and mediator arrived at a reasonable range of settlement by
7 considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins.*
8 *Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West*
9 *Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

10 Here, Plaintiff's counsel engaged in lengthy arm's-length negotiations with
11 Trader Joe's counsel, and were thoroughly familiar with the applicable facts, legal
12 theories, and defenses. Although Plaintiff and her counsel believe that Plaintiff's
13 claims have merit, they also recognize that they will face risks at class certification,
14 summary judgment, and trial. Trader Joe's would no doubt present a vigorous defense
15 at trial, and there is no assurance that the class would prevail. Thus, in the eyes of
16 Plaintiff's counsel, the proposed Settlement provides the Settlement Class with an
17 outstanding opportunity to obtain significant relief at this early stage in the litigation.
18 The Settlement Agreement also abrogates the risks that might prevent them from
19 obtaining relief.

20 **B. Risk Of Continuing Litigation**

21 As referenced above, proceeding in this litigation in the absence of settlement
22 poses various risks such as failing to certify a class, having summary judgment
23 granted against Plaintiff, or losing at trial. Such considerations have been found to
24 weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v.*
25 *Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008)
26 ("Settlement avoids the complexity, delay, risk and expense of continuing with the
27 litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff
28

1 class.”). Even assuming that Plaintiff were to survive summary judgment, she would
2 face the risk of establishing liability at trial in light of conflicting expert testimony
3 between their own expert witnesses and Trader Joe’s expert witnesses. In this “battle
4 of experts,” it is virtually impossible to predict with any certainty which testimony
5 would be credited, and ultimately, which expert version would be accepted by the
6 jury. The experience of Plaintiff’s counsel has taught them that these considerations
7 can make the ultimate outcome of a trial highly uncertain.

8 Moreover, even if Plaintiff were to prevail at trial, the class would face
9 additional risks if Trader Joe’s appeals or moves for a new trial. For example, in *In re*
10 *Apple Computer Sec. Litig.*, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991),
11 the jury rendered a verdict for plaintiffs after an extended trial. Based on the jury’s
12 findings, recoverable damages would have exceeded \$100 million. However, weeks
13 later, the trial judge overturned the verdict, entering judgment notwithstanding the
14 verdict for the individual defendants, and ordered a new trial with respect to the
15 corporate defendant. By settling, Plaintiff and the Settlement Class avoid these risks,
16 as well as the delays and risks of the appellate process.

17 **C. Risk Of Maintaining Class Action Status**

18 In addition to the risks of continuing the litigation, Plaintiff would also face
19 risks in certifying a class and maintaining that class status through trial. Even
20 assuming that the Court were to grant a motion for class certification, the class could
21 still be decertified at any time. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at
22 *6 (N.D. Cal. Mar. 18, 2013) (“The notion that a district court could decertify a class
23 at any time is one that weighs in favor of settlement.”) (internal citations omitted).
24 From their prior experience, Plaintiff’s counsel anticipates that Trader Joe’s would
25 likely move for reconsideration, attempt to appeal the Court’s decision pursuant to
26 Rule 23(f), and/or move for decertification at a later date. Here, the Settlement
27 Agreement eliminates these risks by ensuring Settlement Class Members a recovery
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1 that is “certain and immediate, eliminating the risk that class members would be left
2 without any recovery ... at all.” *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS
3 29042, at *8 (N.D. Cal. Mar. 5, 2010).

4 **D. The Extent Of Discovery And Status Of Proceedings**

5 Under this factor, courts evaluate whether class counsel had sufficient
6 information to make an informed decision about the merits of the case. *See In re*
7 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, this matter has
8 progressed through fact discovery more than sufficiently. Accordingly, as discussed
9 above, Plaintiff’s counsel has received, examined, and analyzed information,
10 documents, and materials that enabled them to assess the likelihood of success on the
11 merits. These efforts include extensive consultations with experts from NOAA,
12 reviewing and analyzing test results regarding hundreds of tuna cans, numerous
13 interviews with members of the putative class, and significant legal research, analysis
14 of documents and evidence provided by Trader Joe’s, and lengthy negotiations.

15 **E. Experience And Views Of Counsel**

16 “The recommendations of plaintiffs’ counsel should be given a presumption of
17 reasonableness.” *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.
18 Cal. 2008). Deference to Plaintiff’s counsel’s evaluation of the Settlement is
19 appropriate because “[p]arties represented by competent counsel are better positioned
20 than courts to produce a settlement that fairly reflects each party’s expected outcome
21 in litigation.” *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47
22 F.3d 373, 378 (9th Cir. 1995)).

23 Here, the Settlement was negotiated by counsel with extensive experience in
24 consumer class action litigation, including extensive experience litigating consumer
25 claims regarding allegedly underfilled canned tuna. *See* Fisher Decl. Ex. 4 (firm
26 resume of Bursor & Fisher, P.A.). Based on their collective experience, Class
27 Counsel concluded that the Settlement Agreement provides exceptional results for the
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1 Settlement Class while sparing Settlement Class Members from the uncertainties of
2 continued and protracted litigation.

3 **V. THE COURT SHOULD PROVISIONALLY CERTIFY THE**
4 **SETTLEMENT CLASS FOR THE PURPOSES OF PRELIMINARY**
5 **APPROVAL**

6 The Ninth Circuit has recognized that certifying a settlement class to resolve
7 consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When
8 presented with a proposed settlement, a court must first determine whether the
9 proposed settlement class satisfies the requirements for class certification under Rule
10 23. In assessing those class certification requirements, a court may properly consider
11 that there will be no trial. *Amchem*, 521 US at 620 (“Confronted with a request for
12 settlement-only class certification, a district court need not inquire whether the case, if
13 tried, would present intractable management problems ... for the proposal is that there
14 be no trial.”).

15 The Settlement Class consists of “All persons in the United States who
16 purchased Trader Joe’s Tuna (*i.e.*, 5 oz. Trader Joe’s Albacore Tuna in Water Salt
17 Added, 5 oz. Trader Joe’s Albacore Tuna in Water Half Salt, 5 oz. Trader Joe’s
18 Albacore Tuna in Water No Salt Added, 5 oz. Trader Joe’s Albacore Tuna in Olive
19 Oil Salt Added, 5 oz. Trader Joe’s Skipjack Tuna in Water With Sea Salt, and 5 oz.
20 Trader Joe’s Yellowfin Tuna in Olive Oil Solid Light) from January 5, 2012 through
21 the date on which class notice is disseminated.” Excluded from this definition are (a)
22 the Defendants and all of Defendants’ past and present respective parents,
23 subsidiaries, divisions, affiliates, persons and entities directly or indirectly under its or
24 their control in the past or in the present; (b) Defendants’ respective assignors,
25 predecessors, successors, and assigns; (c) all past or present partners, shareholders,
26 managers, members, directors, officers, employees, agents, attorneys, insurers,
27 accountants, and representatives of any and all of the foregoing; (d) Defendants’
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1 manufacturers, distributors, and suppliers of the Trader Joe's Tuna Products; and
2 (e) all persons who file a timely Request for Exclusion from the Settlement Class.

3 This Court has not yet certified this case as a class action. For the reasons
4 below, the Class meets the requirements of Rule 23(a) and (b). For settlement
5 purposes, the parties and their counsel request that this Court provisionally certify the
6 Settlement Class.

7 **A. The Class Satisfies Rule 23(a)**

8 **1. Numerosity**

9 Rule 23(a)(1) requires that "the class is so numerous that joinder of all members
10 is impracticable." *See* Fed. R. Civ. P. 23(a)(1). "As a general matter, courts have
11 found that numerosity is satisfied when class size exceeds 40 members, but not
12 satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649,
13 654 (C.D. Cal. 2000). Here, the proposed Settlement Class is comprised of millions
14 of consumers who purchased the Trader Joe's Tuna Products – a number that
15 obviously satisfies the numerosity requirement. Accordingly, the proposed Settlement
16 Class is so numerous that joinder of their claims is impracticable.

17 **2. Commonality**

18 Rule 23(a)(2) requires the existence of "questions of law or fact common to the
19 class." *See* Fed R. Civ. P. 23(a)(2). Commonality is established if plaintiffs and class
20 members' claims "depend on a common contention," "capable of class-wide
21 resolution ... meaning that determination of its truth or falsity will resolve an issue
22 that is central to the validity of each one of the claims in one stroke." *Wal-Mart*
23 *Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the commonality
24 requirement may be satisfied by a single common issue, it is easily met. H. Newberg
25 & Conte, 1 Newberg on Class Actions § 3.10, at 3-50 (1992).

26 There are ample issues of both law and fact that are common to the members of
27 the Settlement Class. Indeed, all of the Settlement Class Members' claims arise from
28

1 a common nucleus of facts and are based on the same legal theories. By way of
2 example, the Plaintiff alleges that the Defendants underfilled their tuna products, and
3 regularly failed to comply with the minimum federal pressed weight standards for 5
4 oz. cans of tuna. Commonality is satisfied by the existence of these common factual
5 issues. *See Arnold v. United Artists Theatre Circuit, Inc.* 158 F.R.D. 439, 448 (N.D.
6 Cal. 1994) (commonality requirement met by “the alleged existence of common ...
7 practices”).

8 Second, Plaintiff’s claims are brought under legal theories common to the
9 Settlement Class as a whole. Alleging a common legal theory alone is enough to
10 establish commonality. *See Hanlon*, 150 F.3d at 1019 (“All questions of fact and law
11 need not be common to satisfy the rule. The existence of shared legal issues with
12 divergent factual predicates is sufficient, as is a common core of salient facts coupled
13 with disparate legal remedies within the class.”). Here, all of the legal theories
14 asserted by Plaintiff are common to all Settlement Class Members. Given that there
15 are no issues of law identified by either party which would tend to affect only
16 individual members of the Settlement Class, common issues of law clearly
17 predominate over individual ones. Thus, commonality is satisfied.

18 3. Typicality

19 Rule 23(a)(3) requires that the claims of the representative plaintiffs be “typical
20 of the claims ... of the class.” *See* Fed. R. Civ. P. 23(a)(3). “Under the rule’s
21 permissive standards, representative claims are ‘typical’ if they are reasonably co-
22 extensive with those of absent class members; they need not be substantially
23 identical.” *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement,
24 the representative Plaintiff simply must demonstrate that the members of the
25 Settlement Class have the same or similar grievances. *Gen. Tel. Co. of the Southwest*
26 *v. Falcon*, 457 U.S. 147, 161 (1982).

27 The claims of the named Plaintiff are typical of those of the Settlement Class.
28

1 Like those of the Settlement Class, Plaintiff's claims arise out of the purchase of the
2 Defendants' tuna products and the alleged underfilling of those products. That is,
3 Plaintiff Reyes purchased several of Defendants' tuna products and was directly
4 impacted by the allegedly underfilled cans. Plaintiff Reyes has precisely the same
5 claims as the Settlement Class, and must satisfy the same elements for her claims, as
6 must other Settlement Class Members. Supported by the same legal theories, the
7 named Plaintiff and all Settlement Class Members share claims based on the same
8 alleged course of conduct. The named Plaintiff and all Settlement Class Members
9 have been injured in the same manner by this conduct. Therefore, Plaintiff Reyes
10 satisfies the typicality requirement.

11 4. Adequacy

12 The final requirement of Rule 23(a) is set forth in subsection (a)(4) which
13 requires that the representative parties "fairly and adequately protect the interests of
14 the class." *See* Fed. R. Civ. P. 23(a)(4). A plaintiff will adequately represent the
15 interests of the class where: (1) plaintiffs and their counsel do not have conflicts of
16 interest with other class members, and (2) where plaintiffs and their counsel prosecute
17 the action vigorously on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938,
18 958 (9th Cir. 2003). Moreover, adequacy is presumed where a fair settlement was
19 negotiated at arm's-length. 2 *Newberg on Class Actions, supra*, § 11.28, at 11-59.

20 Class Counsel have vigorously and competently pursued the Settlement Class
21 Members' claims. The arm's-length settlement negotiations that took place over
22 several months and the detailed and comprehensive investigation they undertook
23 demonstrate that Class Counsel adequately represent the Settlement Class. Moreover,
24 the named Plaintiff and Class Counsel have no conflicts of interest with the Settlement
25 Class. Rather, the named Plaintiff, like each absent Settlement Class Member, has a
26 strong interest in proving Defendants' course of conduct and in obtaining redress. In
27 pursuing this litigation, Class Counsel, as well as the named Plaintiff, have advanced
28

1 and will continue to advance and fully protect the common interests of all members of
2 the Settlement Class. Class Counsel has demonstrated an extensive experience and
3 expertise in prosecuting complex class actions, consumer class actions, and
4 specifically class actions involving underfilled cans of tuna. Class Counsel are active
5 practitioners who are highly experienced in class action, product liability and
6 consumer fraud litigation. *See* Fisher Decl. Ex. 4 (firm resume of Bursor & Fisher,
7 P.A.). Accordingly, Rule 23(a)(4) is satisfied.

8 **B. The Class Satisfies Rule 23(b)(3)**

9 In addition to meeting the prerequisites of Rule 23(a), Plaintiff must also meet
10 one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v.*
11 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b),
12 a class action may be maintained if “the court finds that the questions of law or fact
13 common to the members of the class predominate over any questions affecting only
14 individual members, and that a class action is superior to other available methods for
15 fairly and efficiently adjudicating the controversy.” *See* Fed. R. Civ. P. 23(b)(3).
16 Certification under Rule 23(b)(3) is appropriate “whenever the actual interests of the
17 parties can be served best by settling their differences in a single action.” *Hanlon*, 150
18 F.3d at 1022.

19 **1. Common Questions Of Law And Fact Predominate**

20 The proposed Settlement Class is well-suited for certification under Rule
21 23(b)(3) because questions common to the Settlement Class Members predominate
22 over questions affecting only individual Settlement Class Members. Predominance
23 exists “[w]hen common questions present a significant aspect of the case and they can
24 be resolved for all members of the class in a single adjudication.” *Hanlon*, 150 F.3d at
25 1022. As the U.S. Supreme Court has explained, when addressing the propriety of
26 certification of a settlement class, courts take into account the fact that a trial will be
27 unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at
28

1 620.

2 In this case, common questions of law and fact exist and predominate over any
3 individual questions, including in addition to whether this Settlement is reasonable
4 (*see Hanlon*, 150 F.3d at 1026–27), *inter alia*: (1) whether Defendants’
5 representations regarding the Trader Joe’s Tuna Products were false and misleading or
6 reasonably likely to deceive consumers; (2) whether the Trader Joe’s Tuna Products
7 were underfilled; (3) whether Defendants violated the CLRA, UCL, or FAL; (4)
8 whether Defendants breached an implied warranty; (5) whether Defendants had
9 defrauded Plaintiff and Settlement Class Members; (6) whether the Defendants were
10 unjustly enriched in regards to the products at issue; and (7) whether Plaintiff and the
11 Settlement Class have been injured by the wrongs complained of, and if so, whether
12 Plaintiff and the Settlement Class are entitled to damages, injunctive and/or other
13 equitable relief, including restitution or disgorgement, and if so, the nature and
14 amount of such relief.

15 Furthermore, the Court may readily certify a nationwide settlement class, given
16 that Plaintiff’s complaint brings a claim for unjust enrichment (among other causes of
17 action). Indeed, the law of unjust enrichment is uniform throughout the United States.
18 “There is general agreement among courts that the ‘minor variations in the elements
19 of unjust enrichment under the laws of the various states ... are not material and do
20 not create an actual conflict.’” *In re Checking Account Overdraft Litig.*, 307 F.R.D.
21 656, 675 (S.D. Fla. 2015) (quoting *Pennsylvania Emp. Benefit Trust Fund v. Zeneca,*
22 *Inc.*, 710 F. Supp. 2d 458, 477 (D. Del. 2010)); *see also, e.g., In re Abbott*
23 *Laboratories Norvir Anti-Trust Litig.*, 2007 WL 1689899, at *9-10 (N.D. Cal. 2007)
24 (certifying nationwide unjust enrichment class because “the variations among some
25 states’ unjust enrichment laws do not significantly alter the central issue or the manner
26 of proof”). “Application of the unjust enrichment doctrine has a ‘universal thread,’ ...
27 and the claim is well-suited for multi-state class treatment by virtue of its uniform
28

1 availability and focus on the defendant's ill-gotten gain." *In re Checking Account*
2 *Overdraft Litig.*, 307 F.R.D. at 675 (citation omitted).

3 Specifically, a claim for unjust enrichment requires proof of "(1) receipt of a
4 benefit; and (2) the unjust retention of the benefit at the expense of another." *Shum v.*
5 *Intel Corp.*, 630 F. Supp. 2d 1063, 1073 (N.D. Cal. 2009). The essential inquiry in
6 any action for unjust enrichment is "the retention of the benefit is unjust" given "the
7 circumstances of its receipt." *Id.* This claim is therefore susceptible to common
8 proofs described above. *See In re Abbott Laboratories Norvir Anti-Trust Litig.*, 2007
9 WL 1689899, at *9-10; *see also In re Amla Litig.*, 282 F. Supp. 3d 751, 768 (S.D.N.Y.
10 2017) ("Plaintiffs have therefore shown that common issues predominate as to their
11 unjust enrichment claims.").

12 2. *A Class Action Is The Superior Mechanism For Adjudicating This*
13 *Dispute*

14 The class mechanism is superior to other available means for the fair and
15 efficient adjudication of the claims of the Settlement Class. Each individual
16 Settlement Class Member may lack the resources to undergo the burden and expense
17 of individual prosecution of the complex and extensive litigation necessary to
18 establish Defendants' liability. Individualized litigation increases the delay and
19 expense to all parties and multiplies the burden on the judicial system presented by the
20 complex legal and factual issues of this case. Individualized litigation also presents a
21 potential for inconsistent or contradictory judgments. In contrast, the class action
22 device presents far fewer management difficulties and provides the benefits of single
23 adjudication, economy of scale, and comprehensive supervision by a single court.

24 Moreover, since this action will now settle, the Court need not consider issues
25 of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a
26 request for settlement-only class certification, a district court need not inquire whether
27 the case, if tried, would present intractable management problems, see Fed. Rule Civ.
28 Proc. 23(b)(3)(D), for the proposal is that there be no trial."). Accordingly, common

questions predominate and a class action is the superior method of adjudicating this controversy.

VI. THE PROPOSED NOTICE PROGRAM PROVIDES ADEQUATE NOTICE AND SHOULD BE APPROVED

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to “direct notice in a reasonable manner to all class members who would be bound by a proposal.” Fed. R. Civ. P. 23(e)(1).

When a court is presented with a class-wide settlement prior to the certification stage, the class certification notice and notice of settlement may be combined in the same notice. *Manual*, § 21.633 at 321-22 (“For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined.”). This notice allows the settlement class members to decide whether to opt out, participate in the class, or object to the settlement. *Id.*

The requirements for the content of class notices for (b)(3) classes are specified in Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). Each of the proposed forms of notice, including the Long Form and Short Form notices, meet all of these requirements, as detailed in the following table:

Requirement	Long Form	Short Form
“The nature of the action.” Fed. R. Civ. P. 23(c)(2)(B)(i).	First introductory bullet; Q&A nos. 2 and 5.	Col. 1, ¶ 1.

Requirement	Long Form	Short Form
“The definition of the class certified.” Fed. R. Civ. P. 23(c)(2)(B)(ii).	Second introductory bullet; Q&A no. 4.	Col. 1, ¶ 2.
“The class claims, issues, or defenses.” Fed. R. Civ. P. 23(c)(2)(B)(iii).	First introductory bullet; Q&A nos. 2, 5 and 6.	Col. 1, ¶ 1.
“That a class member may enter an appearance through an attorney if the member so desires.” Fed. R. Civ. P. 23(c)(2)(B)(iv).	Q&A nos. 16, 17, 18, and 19.	Col. 2, ¶ 3.
“That the court will exclude from the class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(v).	Table of “Your Legal Rights and Options”; Q&A nos. 11, 12 and 13.	Col. 2, ¶ 2.
“The time and manner for requesting exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(vi).	Q&A no. 13.	Col. 2, ¶ 2.
“The binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B)(vii).	Table of “Your Legal Rights and Options”; Q&A nos. 11, 12, and 24.	Col. 1, ¶ 5.

In addition to meeting the specific legal requirements of Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii), the proposed notices are based on the Federal Judicial Center’s (“FJC”) model forms for notice of pendency of a class action. FJC prepared these models at the request of the Subcommittee on Class Actions of the U.S. judicial branch’s Advisory Committee on the Federal Rules of Civil Procedure. *See* www.fjc.gov. The FJC models are designed to illustrate how attorneys and judges might comply with Fed. R. Civ. P. 23(c)(2)(B)’s requirement that class action notices “must concisely and clearly state in plain, easily understood language” specific information about the nature and terms of a class action and how it might affect

1 potential class members' rights. *See* www.fjc.gov. FJC explained its methodology
2 for preparing these models as follows:

3 We began this project by studying empirical research and
4 commentary on the plain language drafting of legal
5 documents. We then tested several notices from recently
6 closed class actions by presenting them to nonlawyers,
7 asking them to point out any unclear terms, and testing their
8 comprehension of various subjects. Through this process,
9 we identified areas where reader comprehension was low.
10 We found, for example, that nonlawyers were often
11 confused at the outset by use of the terms "class" and "class
12 action." Combining information from the pilot test with
13 principles gleaned from psycholinguistic research, we
14 drafted preliminary illustrative class action notices and
15 forms. We then asked a lawyer-linguist to evaluate them for
16 readability and redrafted the notices in light of his
17 suggestions.

18 *Id.* FJC then tested the redrafted model notices "before focus groups composed of
19 ordinary citizens from diverse backgrounds" and also through surveys "[u]sing
20 objective comprehension measures." *Id.*

21 Based on FJC's testing, the Plaintiff and Class Counsel believe that each of the
22 proposed class notices, which are very closely based on FJC models, with the format
23 and content adopted almost verbatim in most instances, are accurate, balanced, and
24 comprehensible.

25 These notices will be disseminated through a media plan developed by
26 Kurtzman Carson Consultants ("KCC"), a firm with experience administering more
27 than 2,000 settlements, which has been chosen by the parties as the Settlement
28 Administrator. *See* Settlement Agreement ¶ 1.19, Fisher Decl. Ex. 1; Peak Decl. ¶ 3
("Since 1984, KCC has administered more than 6,000 matters and distributed
settlement payments totaling well over \$20 billion in assets."). KCC's proposed
notice plan includes creation of a dedicated settlement website, an Internet banner ad
campaign, and print publication in *National Geographic*, the *New York Times*, and the

1 *Los Angeles Daily News*, which will reach “approximately 70% of likely Class
2 Members.” Peak Decl. ¶¶ 8-13. KCC advises that this notice plan is “consistent with
3 the 70-95% reach guideline set forth in the Federal Judicial Center’s *Judges’ Class*
4 *Action Notice and Claims Process Checklist and Plain Language Guide*, which
5 considers 70-95% reach among class members reasonable.” *Id.* ¶ 14. KCC estimates
6 that its services in providing notice and claims administration will cost \$357,953. *See*
7 Settlement Agreement ¶ 4.5, Fisher Decl., Ex. 1.

8 This proposed method of giving notice was developed by KCC, in collaboration
9 with Class Counsel, with the objective of ensuring that as much of the Settlement
10 Fund as possible will be distributed to Settlement Class Members in the most simple
11 and expedient manner. *See, e.g.*, William B. Rubenstein, *Newberg on Class Actions* §
12 12:35 (5th ed. 2014) (“[A] court’s goal in distributing class action damages is to get as
13 much of the money to the class members in as simple a manner as possible.”); *see also*
14 *id.* § 12:15 (“The goal of any distribution method is to get as much of the available
15 damages remedy to class members as possible and in as simple and expedient a
16 manner as possible.”). With claim amounts at \$29, it will take approximately 17,300
17 Cash Claims to exhaust the Cash Settlement Fund, and Class Counsel has asked KCC
18 to design the notice and claims process to accomplish this objective. Fisher Decl.
19 ¶ 13.

20 **VII. CONCLUSION**

21 For the foregoing reasons, Plaintiff respectfully requests that the Court approve
22 the Settlement Agreement, provisionally certify the Settlement Class for the purposes
23 of preliminary approval, approve the proposed notice plan, and enter the [Proposed]
24 Order Granting Motion for Preliminary Approval of Class Action Settlement,
25 submitted herewith.

1 Dated: September 14, 2018

Respectfully submitted,

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